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SUPREME COURT, U.S.
IN THE

Supreme Court of the United States

October Term, 1948.

No. 2431

THE HOME INSURANCE COMPANY and
TRADESMANS NATIONAL BANK
AND TRUST COMPANY,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION,
C. A. JOHNSON, LUCILLE WHITE, and
FRANCES BOEHM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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INDEX.

	PAGE
Interest of Petitioners	2
Opinions Below	3
Jurisdiction to Review.....	3
Statute Involved.....	3
Statement of Facts	6
Preliminary	6
The Plan	6
Summary of Opinion of the District Court	7
Summary of Opinion of the Circuit Court of Appeals	9
Questions Presented	10
Reasons for Granting the Writ	11

CITATIONS.

Cases:

	PAGE
Lahti v. New England Power Association, 160 F. 2d 845	10, 15
Massachusetts Mutual Life Ins. Co. v. S. E. C., 151 F. 2d 424	10, 15
Otis & Co. v. S. E. C., 323 U. S. 624	9, 11
Securities and Exchange Commission v. Chenery Corp., 332 U. S. 195	12, 13
Standard Gas and Electric Company, — S. E. C. — (1944), Holding Company Act Release No. 5430, plan disapproved, 59 F. Supp. 27 (D. Del., 1945), rev'd 151 F. 2d 326	10

Statutes:

Public Utility Holding Company Act of 1935:	
Section 11 (e)	1, 3, 7, 9, 10, 11, 13, 14, 15
Section 24 (a)	4, 11, 13, 14
Judicial Code:	
Section 240 (a) (43 Stat. 938, 28 U. S. C. Sec. 24 (a))	3

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Home Insurance Company, a New York corporation, and Tradesmens National Bank and Trust Company, a national banking association, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a final order and judgment of that Court, entered March 19, 1948 (R. 41),¹ vacating a decree of the United States District Court for the District of Delaware and remanding the cause to the District Court with directions to enter an order disapproving a plan filed by Engineers Public Service Company (Engineers) under Section 11 (e) of the Public Utility Holding Company Act

¹ Record references are in parenthesis.

Petition for Writ of Certiorari

of 1935 as not being fair and equitable within the purview thereof, and to return the record to the Commission to the end that it may take such action as the facts and the law may require (R. 40). The petitioners seasonably filed with the Circuit Court of Appeals their Petition for Rehearing (R. 92), which petition was denied by order entered June 11, 1948 (R. 140). A certified transcript has been furnished in accordance with Rule 38, Paragraph 1, of the Rules of this Court, having been filed by the Securities and Exchange Commission on behalf of itself and preferred stockholders participating in the proceedings below and pursuant to Stipulation of Counsel (R. 41).

INTEREST OF PETITIONERS.

The Home Insurance Company and five affiliated companies, namely, City of New York Insurance Company, National Liberty Insurance Company of America, The Homestead Fire Insurance Company, The New Brunswick Fire Insurance Company, and The Georgia Home Insurance Company, and Tradesmen's National Bank and Trust Company, collectively, were the owners of 7400 shares (having a stated value of \$740,000) of preferred stock of Engineers, and as preferred stockholders have participated in the proceedings before the Commission and in the District Court and the Circuit Court of Appeals. When the plan was consummated in June, 1946, each preferred stockholder received payment of \$100. per share plus accrued dividends on account of its shares of preferred stock, retaining under the plan and accompanying escrow arrangement a claim for such additional amount as may ultimately be found payable on its shares of preferred stock. On June 1, 1948, the four affiliates first above-named were merged into The Home Insurance Company as the surviving corporation, and on June 30, 1948, The Home Insurance Company acquired by purchase the assets of the fifth affiliate, thereby succeeding to the surviving claims of the five affiliates as preferred stockholders of Engineers.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R.12), and the opinion denying the petitions and cross-petitions for rehearing (R. 138) have not yet been reported. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported, but are set forth in the Commission's Holding Company Release Numbers 7041 (R. 25a) and 7119 (R. 128a).

JURISDICTION TO REVIEW.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 247 (a)), made applicable by Section 25 of the Public Utility Holding Company Act of 1935. The date of the order and judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was entered March 19, 1948. The petition for rehearing was denied on June 11, 1948.

STATUTE INVOLVED.

Section 11 (e) of the Public Utility Holding Company Act of 1935 provides as follows:

"In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for

Petition for Writ of Certiorari

hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Section 24 (a) of the same Act provides as follows:

"Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia; by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the

Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. *The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.*² If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. *The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive;*² and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

² Italics supplied.

STATEMENT OF FACTS.**Preliminary.**

The Commission has heretofore filed a Petition for Certiorari in this Court for the purpose of obtaining a review of the order and judgment of the Circuit Court of Appeals. Its petition includes a Statement (pp. 7-12) setting forth the features of the plan relevant to the surviving dispute, the history of the formulation of the plan, and the history of the proceedings. The petitioners respectfully request this Court to consider this Statement against the background furnished by the Statement of the Commission.

The Plan.

Engineers' amended plan as filed by it provided for satisfaction of the claims of its preferred stockholders in cash, distribution of the remaining assets, consisting of the common stocks of operating utility companies, in kind to the common stockholders, and dissolution of Engineers. The amounts to be paid to the preferred stockholders were \$110. per share for the \$6. and \$5.50 dividend series and \$105. per share for the \$5. dividend series, plus accrued dividends in each case. In order to obtain the balance of cash needed to pay off the preferred stockholders, Engineers was to distribute to its common stockholders purchase warrants for the purchase of common stock of one of its operating companies and sell in the open market the shares not purchased by its common stockholders under the warrants. The amended plan was filed by Engineers after the Commission, following extensive hearings, had disapproved as unfair and inequitable a previous plan providing for payment to the preferred stockholders of \$100. per share plus accrued dividends; and had held that the preferred stockholders were entitled to the larger amounts now provided in the amended plan in exchange for their rights surrendered.

Summary of Opinion of the District Court.

The Commission approved the amended plan, and at the request of Engineers pursuant to Section 11 (e) of the Act, filed enforcement proceedings under Section 18 (f) of the Act. The District Court approved the plan as fair and equitable, except for any allowance to preferred stockholders in excess of \$100. per share and accrued dividends; and entered an order enforcing the plan as amended by it. Cash in an amount equal to the difference between the plan as approved by the Commission and as amended by the District Court was placed in escrow and the portion of the plan so approved was consummated, subject to reservation of the disputed issue.

The District Court found that the liquidating preference of the preferred stocks set forth in Engineers' charter was not dispositive, but only one of the factors to be considered in evaluating the preferred stocks. It, nevertheless, disapproved the payment of anything in excess of the liquidating preference on the basis of "colloquial equity." Among the factors entering into the District Court's conception of colloquial equity were such items as the original issue prices, underwriting costs, market prices and dividend records of the preferred and common stocks during the existence of the enterprise, market purchases of preferred stocks by Engineers, earnings retained in the system, losses said to have been sustained by Engineers in making previous divestments in compliance with Section 11 (b) of the Act. The District Court also scaled down the claim of the preferred stockholders by some indefinite amount because it considered the dividend rates for the three series of preferred stock "excessive," saying that fairness and equity do not require that preferred stockholders be paid an additional sum for the theoretical future deprivation of their "present excessive dividend rates"—which are part of the very claims to be evaluated under

any plan (R. 291a). The Court accepted the Commission's valuations of the preferred stocks as applicable at the time under consideration, but refused to recognize them as the equitable equivalent of the preferred stocks because of the possibility of future decline and the off-setting factors entering into the "colloquial equity" (R. 290a).

Chronologically the District Court first filed its opinion in which it simply arrived at a value of \$100. per share for the preferred stock as a matter of "colloquial equity." Certain "off-setting" factors were used to scale down the present going concern values for the preferred as found by the Commission and conceded by the Court to \$100. per share, thus eliminating what the Court called the premium. Subsequently the Court filed findings of fact and conclusions of law (initially prepared by the common stockholders) adhering to the concept of colloquial equity, but reversing the approach. The Court started with the premise that payment of the maximum amount originally contributed by the preferred stockholders or their predecessors, without deduction for any underwriting expenses or discount, is fair and equitable, and failed to find any special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, which would create any equitable circumstances warranting payment to the preferred stockholders of amounts in excess of \$100. per share plus accrued dividends (R. 316a):

It is not possible to discover from the District Court's opinion, findings of fact, or conclusions of law the extent to which the several factors deemed relevant by the Court entered into its ultimate conclusion or how such factors were evaluated. All we know is that these factors absorbed exactly the excess of the going concern value over the involuntary liquidating preference of \$100. per share plus accrued dividends.

Summary of Opinion of the Circuit Court of Appeals.

The gist of the opinion is that a district court in a proceeding under Section 11 (e) must exercise its independent plenary judgment as an equity reorganization tribunal in every matter relating to the fairness and equity of the plan; the court is not bound by the findings and conclusions of the Commission as an administrative tribunal, and while a district court may not substitute its valuations for those of the Commission, it may reject valuations even though based on substantial evidence; in this case the District Court Judge weighed the numerous elements involved in the case on his own scales, and in the exercise of his independent judgment, arrived at the conclusion that the plan was not fair and equitable; the weight and emphasis applied by the District Court and the Commission to the various factors in the case go to two primary considerations on which the two tribunals differed, namely, (1) the Commission did not determine and apportion the earning power of the enterprise between the preferred and common stocks based on their respective claims as it did in the *United Light & Power Company* case (*Otis & Co. v. S. E. C.*, 323 U. S. 624), and (2) the Commission failed to consider and give effect to losses said to have been sustained by Engineers on previous divestitures compelled by the Act; the Commission's "investment value" for the preferred stocks did not give effect to all the pertinent factors and substantial equities; the District Court's conclusion was not clearly erroneous; however, the District Court cannot amend a plan and enforce it and the record should have been remanded to the Commission for further and appropriate action.

We have, therefore, a situation where the Commission and the District Court used different weights and measures to arrive at opposite conclusions, and the Circuit Court of Appeals, favoring in substance the "colloquial equity" concept of the District Court, has held that the Commission should have considered and given effect to an allocation of

future earning power and historical losses. The Commission did consider the loss factor and found it irrelevant in law and in fact (R. 64a, 65a, 72a, n. 55). The Commission did consider the future earning power in determining the going concern value of the preferred stocks, but did not allocate earning power between the preferred and common stocks for the simple reason that, under the plan, the common stockholders received the full benefit of the residual earning power through the distribution in kind of the common stocks of the operating companies, augmented by the decrease in expenses resulting from the dissolution of the enterprise.

In passing the Circuit Court of Appeals recognized that its conclusion as to the function of a district court and the scope of review in proceedings under Section 11 (e) conflicts with decisions in other circuits, citing *Lahti v. New England Power Ass'n*, 1 Cir., 160 F. 2d 845, 858, and *Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 8 Cir., 151 F. 2d 424, 430, affirming *In re Laclede Gas Light Co.*, D. C. E. D. Mo. E. D. 57 F. Supp. 997, 1004. It distinguished its own decision in *In re Standard Gas & Electric Co.*, 3 Cir., 151 F. 2d 326, by saying the question here presented was not in focus in that case, but we respectfully suggest that an adjustment of the judicial lens would bring it in focus and classify the decision with the other Circuit cases just cited (R. 31, 32).

QUESTIONS PRESENTED.

1. Did the Commission properly apply the fair and equitable standards of Section 11 (e) of the Public Utility Holding Company Act in approving as part of a plan payment to preferred stockholders of cash equal to the current going concern value of their shares, not exceeding the voluntary call prices therefor.
2. May the Commission, in applying fair and equitable standards to a plan under Section 11 (e) of the Public Utility Holding Company Act, be required to determine

whether there have been any losses as a result of prior divestments or other action taken by the Company in compliance with Section 11 (b) of the Act and charge such losses in whole or in part to preferred stockholders generally, and particularly when the amounts to be paid the preferred stockholders for their rights surrendered do not exceed the going concern value thereof based on the residual enterprise.

3. Where the Commission finds that a plan filed under Section 11 (e) of the Public Utility Holding Company Act is fair and equitable to the persons affected thereby and such finding is based on substantial evidence and has rational foundation in law, may the District Court reject such finding on the basis of an independent discretion in view of the principles generally applicable to findings and conclusions of administrative tribunals and particularly in view of Section 24 (a) of the Act which, recognizing the stature and competence of the Commission, makes its findings as to the facts, if supported by substantial evidence, conclusive on any direct review of a plan by a Circuit Court of Appeals?

REASONS FOR GRANTING THE WRIT.

1. The Circuit Court of Appeals has decided an important question of Federal law in conflict with the decision in *Otis & Co. v. S. E. C.*, 323 U. S. 624, or in conflict with the proper application of that decision to the facts in this case.

While the Court agreed that the liquidation preference of the preferred stocks set forth in the charter is not dispositive, it indicated that the Commission should have determined the future earning power of the Engineers' system and valued the common stock presumably with reference to that earning power, as was done in the *Otis* case which involved the allocation of a single class of stock between preferred and common stockholders. Here it was conceded that the preferred stocks have going concern

values at least equal to the call prices [the amounts payable under the plan (R. 290a)] and that the preferred stocks would have been redeemed by refunding operations at lower dividend rates had the enterprise continued (R. 920a, 921a). The only problem was to determine the amount payable to the preferred stockholders according to their priorities for the rights being surrendered by them under a plan which gave to the common stockholders all the residual assets and the earning power thereof by distribution in kind.

Having commanded the Commission to ascertain the future earning power of the enterprise and to allocate it between the preferred and common stockholders, the Court also commands the Commission to determine and give effect to prior losses. The Court does not make it clear what losses must be considered, or how such losses are to be related to the future earning power. Is the future earning power to be determined on the basis of the residual system or a reconstructed system incorporating the divested companies, and if the latter, what are to be the capital structures of the reincorporated companies. How are such losses to be related to, or integrated in, the future earning power, or how are they to be separately allocated between the preferred and the common stockholders? The implication is that no matter how strong the preferred stocks may be or become after the losses have occurred, something must be charged to the preferred stockholders. It is clear that the task is impossible. This concept also ignores the fundamental nature of the common stock. While the common stockholders are thus to be protected the prices paid by the original preferred stockholders are the continuing burden of the present preferred stockholders no matter how seasoned or strong the preferred stocks have become.

2. The Circuit Court of Appeals has decided a question of law in conflict with *Securities Commission v. Chenery Corp.* (the second Chenery case), 332 U. S. 194, and the principles generally applicable to the findings of administrative tribunals.

This Court was not passing on the powers and duties of a Section 11 (e) court in the *Cheney* case. The case had gone to the Circuit Court of Appeals on direct appeal from the Commission under Section 24 (a) of the Act, which provides that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive". This Court did not expressly allude in its opinion to the provisions of Section 24 (a), and sustained the findings of the Commission on the ground that the very breadth of the statutory language precludes a reversal of the Commission's judgment, save where it has plainly abused its discretion in "these matters." These matters expressly related back to the application of the "fair and equitable" rule of Section 11 (e) and the standard of "what is detrimental to the public interest or the interest of investors or consumers" under Sections 7 (d) (6) and 7 (e) of the Act. This Court said further that the application of those criteria necessarily requires the use of informed discretion by the Commission.

The Circuit Court of Appeals has also rejected the more conservative rule that findings of the Commission as an administrative tribunal should not be set aside if based on substantial evidence and consistent with law.

The stage is thus set for an impasse in any situation where there may be a reasonable difference of opinion as to valuations and fairness and equity, unless the Commission stultifies itself under the pressure of a veto by the district court. If the decision of the Circuit Court of Appeals is correct, then in any conscientious stand-off between the Commission and a district court in the area of rationality, there is no tribunal in a position to cast a deciding vote. If, on the other hand, the findings and conclusions of the Commission have in the district court the usual stature of the findings and conclusions of administrative tribunals, then the appellate courts would have the problem only of determining whether the Commission had committed error in law or abused its discretion in the area of fact.

finding. This function, so limited, would be consistent with the function of a Circuit Court of Appeals under Section 24 (a). By way of contrast the Circuit Court of Appeals in this case favored the District Court on the ground that the finding of the District Court was not clearly erroneous (R. 39). Surely the reverse of this approach is more consistent with the purpose of the Congress and the Act. Also, the net result of the decision of the Circuit Court of Appeals is that the findings of the Commission have different stature depending on procedural accident, that is, whether the proponents of a plan seek enforcement under Section 11 (e), or proceed without enforcement, leaving an aggrieved person to his remedy under Section 24 (a).

The special competence of the Commission lies in comprehending the problems, investigating the facts, selecting facts according to their relevance and importance, evaluating facts, and reaching ultimate conclusions in accordance with equitable principles. The Commission has the front line problem of discerning whether any fact or combination of facts invoke any principles of law or equitable considerations and then applying such principles and considerations with due weight and with regard for the inter-play of factors in complex situations, exercising its discretion wherever it has a choice. It has the duty of making an equitable valuation of the whole according to its judgment, and the function of a district court under Section 11 (e) should be defined with regard to the wide powers granted the Commission.

The special competence of the Court lies in determining whether applicable principles of law have been violated or disregarded by the Commission in the equitable evaluation of a plan and whether the facts found by the Commission are supported by substantial evidence. While Section 11 (e) gives the district court the independent duty of determining whether plans are fair and equitable before lending its aid to enforcement, its function in this respect is necessarily circumscribed. Congress could never have intended

that the district court should reach over into the area reserved for the special skills of the Commission and substitute its judgment for that of the Commission, provided the Commission's findings and conclusions have a rational basis in fact. While the question of relevance of factors may be so clear in some instances as to become a question of law, the relevance and impact of economic factors in complex situations are more often questions of fact more readily to be resolved in the area allotted to experienced tribunals.

Any other division of labor can lead only to confusion and deadlock.

3. The Circuit Court of Appeals has decided a question of Federal law in conflict with the decision of other Circuit Courts of Appeal on the same subject matter.

As stated in the preceding paragraph, the Circuit Court of Appeals has held that the District Court, in passing upon the fairness and equity of the Plan under Section 11 (e) of the Public Utility Holding Company Act, may exercise its independent judgment or discretion and is not bound to any extent by the findings of fact and conclusions of law of the Commission even though based on substantial evidence and consistent with law. As conceded by the Circuit Court of Appeals (R. 31), this is in direct conflict with the decisions of the 1st Circuit Court of Appeals in *Lahti v. New England Power Association*, 160 F. 2d 845, and the 8th Circuit Court of Appeals in *Massachusetts Mutual Life Insurance Co. v. S. E. C.*, 151 F. 2d 424, affirming *In re Laclede Gas Light Company*, D. C. E. D. Mo., 57 F. Sup. 997.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Judicial Circuit, sitting at Philadelphia, Pennsylvania, to the end that the case may be reviewed and determined by this Court; that the order and judgment of the Circuit Court of Appeals be reversed; and

Petition for Writ of Certiorari

that your petitioners be granted such other and further relief as may seem proper.

THE HOME INSURANCE COMPANY,
TRADESMENS NATIONAL BANK AND
TRUST COMPANY,

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August 20, 1948.